What is International Law?

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Principal Sources of International Law

"International Law" consists primarily of:

1. treaties
2. customary international law
3. general principles of law
4. on a subsidiary basis, interpretation of international law by courts/scholars
5. decisions by international organizations, *if* they are so empowered.

Treaties as Part of U.S. Law

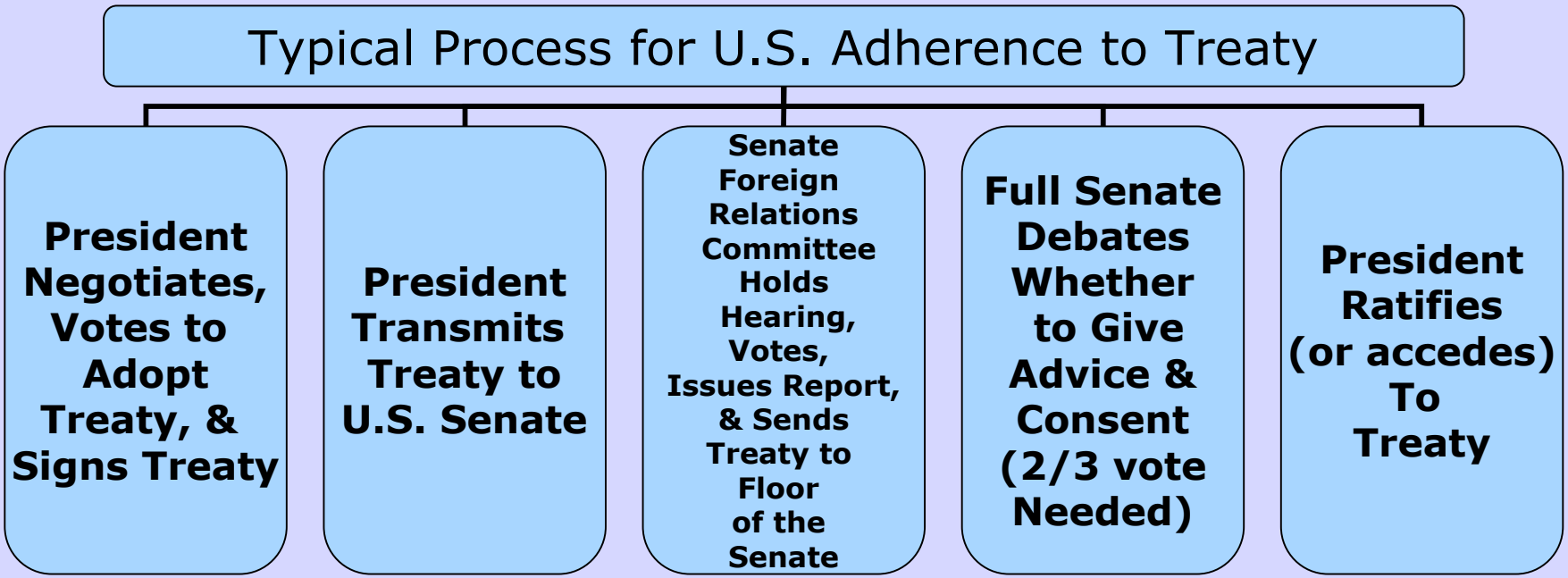
U.S. Constitution, Article II, section 2, clause 2:

> The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . ."

U.S. Constitution, Article VI, clause 2:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made, or which shall be made, under the Authority of the United States*, shall be the supreme Law of the Land . . . ."
>
> (Emphasis Added)

The U.S. Treaty-Making Process



Example of a Self-Executing Treaty: U.S.-Japan Commercial Treaty

Asakura v. City of Seattle, 265 U.S. 332, 339-44 (1924):

"The treaty was made to strengthen friendly relations between the two nations. As to the things covered by it, the provision quoted establishes the rule of equality between Japanese subjects while in this country and native citizens. . . . The rule of equality established by it cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts."

Example of a Statute Implementing a Non-Self-Executing Treaty

Convention Against Torture, Article 3(1):

No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

U.S. Pub. L. No. 105-277, § 2242 (Oct. 21, 1998):

(a) Policy. It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.

(b) Regulations. Not later than 120 days after the date of enactment of this Act, the heads of the appropriate agencies shall prescribe regulations to implement the obligations of the United States under Article 3 of the United Nations Convention Against Torture . . .

Executive Agreements

Three ways U.S. international agreements are concluded without resort to the treaty device:

1. Executive agreement implementating a treaty.

2. Congressional-executive agreement, entailing majority approval by both Houses (*e.g.*, NAFTA).

3. Sole executive agreement based on President's own constitutional authority (*e.g.*, *Dames & Moore* case).

Key Areas Where Congress May Adopt Statutes Using Customary International Law

U.S. Constitution, Article I, section 8: Congress has the power...

"To regulate Commerce with foreign Nations" (clause 3)

"To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations" (clause 10)

"To declare War … and make Rules concerning Captures on Land and Water" (clause 11)

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States…" (clause 18)

Customary International Law as a Part of U.S. Law Even Without a Statute

The Paquete Habana, 175 U.S. 677 (1900):

"International law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative or judicial decision, resort must be had to the customs and usages of civilized nations . . . ."

Customary International Law as Federal Common Law

Sosa v. Alvarez-Machain, 542 U.S. 692, 729-30 (2004):

"[*Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)*] did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way. For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. *See, e.g.*, … *Paquete Habana* … ."

Important Contemporary Statute That Uses Customary International Law

Alien Tort Statute, 28 U.S.C. 1350 (2000)

Confers original jurisdiction on federal district courts over "any civil action by an alien for a tort only, committed in violation of *the law of nations* or a treaty of the United States."

(emphasis added)

Federalism: The Supremacy Clause

U.S. Constitution, Article VI, clause 2:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; *and all Treaties made, or which shall be made, under the Authority of the United States*, shall be the supreme Law of the Land . . . ."

(emphasis added)

Federalism: Forms of Preemption

Preemption of state law in the area of international law may arise from:

1. a treaty preempting a state law (*e.g.*, *Asakura*);
2. a statute that implements a treaty or customary international law that preempts state law;
3. the dormant foreign commerce power; or
4. the dormant foreign affairs power.

Role of Courts in Adjudicating International Law Issues

U.S. Constitution, Article III, section 2, clause 1:

"The judicial power shall extend to all Cases…arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases affecting admiralty and maritime Jurisdiction; to Controversies… between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Judicial Principals for Harmonizing U.S. and International Law

Harmonization: *Murray v. Schooner Charming Betsy (1804)*

Chief Justice Marshall stated that "an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . "

Abstention: *Banco Nacional de Cuba v. Sabbatino (1964)*

"[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law."

Some Contemporary Issues....

Delegation of U.S. Decision-Making to International Organizations

- the International Court's *Avena case*

Using International Law When Interpreting the U.S. Constitution

- the Supreme Court's *Roper v. Simmons* case

Roper v. Simmons, 125 S. Ct. 1183 (2005)

Justice Kennedy, writing for a 5-4 majority:

- The Court found that execution of juvenile offenders was cruel and unusual punishment in violation of the 8th Amendment.
- *"Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. . . It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."*

Roper v. Simmons: Justice Scalia in Dissent

"The basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. …In many significant respects the laws of most other countries differ from our law—including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself."

"[L]et us not forget the Court's abortion jurisprudence, which makes us one of only six countries that allow abortion on demand until the point of viability."